Before the
COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re	
DISTRIBUTION OF CABLE ROYALTY FUNDS	**CONSOLIDATED PROCEEDING NO. 14-CRB-0010-CD (2010–13)**

PUBLIC TELEVISION CLAIMANTS' RESPONSE TO PROGRAM SUPPLIERS' REQUEST FOR REHEARING

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November 19, 2018

Pursuant to the Copyright Royalty Judges' ("Judges") Order Allowing Responses to Motion for Rehearing, dated November 9, 2018, the Public Television Claimants ("Public Television") hereby respond to all seven points enumerated in Program Suppliers' Request for Rehearing of the Initial Determination of Royalty Allocation, dated November 2, 2018 ("Motion"), regarding the Judges' Initial Determination of Royalty Allocation, dated October 18, 2018 and filed publicly on November 8, 2018 ("Determination").

I. Summary of Public Television's Responses to Program Suppliers' Motion

In their Motion, Program Suppliers seek rehearing on seven aspects of the Determination. Rehearing is plainly inappropriate with respect to six of those issues. While rehearing is never *required*, Public Television does not oppose reconsideration of the one remaining issue, which concerns the Determination's upward adjustment for the Settling Devotional Claimants ("SDC") and Canadian Claimants Group ("CCG").

1. Program Suppliers argue that adopting Dr. Crawford's analysis as a starting point for allocating royalties was a "clear departure from precedent." Motion at 4. To the contrary, precedent specifically holds that where, as here, a regression analysis "improved" upon the "volatility and variability" of past Waldfogel-type regression analyses, it "may prove useful for directly measuring relative value."[1] It is undisputed that Dr. Crawford's analysis vastly improved upon the volatility and variability of past Waldfogel-type regression analyses.

2. Program Suppliers argue that it was "legal error" to rely on Dr. Crawford's analysis because Dr. Gray and Dr. Erdem did not replicate Dr. Crawford's analysis. But the law does not require the Judges to ignore one witness's expert testimony simply because other witnesses made mistakes or chose not to spend the time to conduct a proper replication.

[1] *Report of the Copyright Arbitration Royalty Panel to the Librarian of Congress*, Docket No. 2001-8 CARP CD 98-99, at 50 (Oct. 21, 2003) ("*1998–99 CARP Report*").

3. Program Suppliers argue that the Determination failed to articulate a reasoned basis for the "ranges of reasonable allocations" that the Determination identified. But the Determination explained how the Judges arrived at specific awards (except for the award for SDC and CCG, addressed below). The "ranges" are therefore irrelevant.

4. Public Television agrees with Program Suppliers that the Determination did not provide an adequate explanation for its upward adjustments of the awards for SDC and CCG.

5. Program Suppliers argue that it was "legal error" for the Determination to "reallocate Other Sports category shares" as articulated by the Horowitz survey. But expert testimony supported the Determination's conclusion that Other Sports was a misleading category that should not have been included in the survey at all. In any event, this issue is irrelevant because the Determination did not use the Horowitz survey shares in setting final awards.

6. Program Suppliers argue that it was "legal error" to exclude Program Suppliers' corrected testimony regarding WGNA viewing data. But this issue is irrelevant because the Determination concluded that the Judges would not have relied on that testimony in any event.

7. Program Suppliers argue that it was "legal error" for the Judges not to specifically address John Mansell's written testimony regarding sports migration. But the Judges are not required to separately address every piece of evidence, and the evidence upon which the Determination relied (Dr. Crawford's analysis) already accounted for changed circumstances.

II. Standard for Granting Rehearing

The Judges may order a rehearing only "in exceptional cases." 17 U.S.C. § 803(c)(2)(A); *cf. Leidos, Inc. v. Hellenic Republic*, 881 F.3d 213, 217 (D.C. Cir. 2018) ("[T]he reconsideration or amendment of a judgment is . . . an extraordinary measure."). It is well settled that in proceedings before the Copyright Royalty Judges, motions for rehearing "should be granted only where (1) there has been an intervening change in controlling law; (2) new evidence is available;

or (3) there is a need to correct a clear error or prevent manifest injustice." Order Denying Motions for Rehearing, *Distribution of the 2004-2005 Cable Royalty Funds*, Docket No. 2007-3 CRB CD 2004-2005, at 1 (July 19, 2010) ("*2004–05 Denial of Rehearing*"). Error is not a basis for rehearing unless the error is "clear," *id.*, which is the same high bar that courts use for mandamus petitions. *See In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 762 (D.C. Cir. 2014) ("The error has to be clear.").

If an argument was already made, relitigation of that argument is not a basis for rehearing; and if an argument was not made but could have been, it cannot be raised for the first time now. Arguments that "are based on the same view of the evidence" that was "rejected by the Judges in their Distribution Order" are not a basis for granting rehearing. *2004–05 Denial of Rehearing* at 2. Such arguments "do not present the type of exceptional case that would warrant a rehearing or reconsideration." *Id.* The U.S. Court of Appeals for the District of Columbia Circuit applies the same standard for reconsideration that the Judges apply for rehearing, and has held that reconsideration "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Leidos*, 881 F.3d at 217 (quoting *Exxon Shipping v. Baker*, 554 U.S. 471, 486 n.5 (2008)).

Any rehearing, if granted, must be limited to "such matters as the Copyright Royalty Judges determine to be appropriate" for rehearing. 17 U.S.C. § 803(c)(2)(A).

III. Responses to Each of Program Suppliers' Requests for Rehearing

A. The Judges Did Not Clearly Err in Relying on Dr. Crawford's Analysis as a Starting Point.

Program Suppliers argue that "precedent" forbids the Judges from using a Waldfogel-type regression for any purpose other than "to corroborate survey results." Motion at 4. That is a mischaracterization of prior decisions and a misunderstanding of what constitutes precedent.

No prior decision ever held that Waldfogel-type regressions may never be used as a basis to determine awards. Precisely the opposite: Prior decisions expressly held that a Waldfogel-type regression with narrower confidence intervals could be superior to surveys and could be used for directly measuring relative value. In the 1998–99 determination, the Copyright Arbitration Royalty Panel concluded that the Waldfogel-type regression in that proceeding was useful as a corroborating study "and, if volatility and variability are improved, similar analyses may prove useful for directly measuring relative value in future years." *1998–99 CARP Report* at 50. In the 2004–05 determination, the Judges concluded, "Conceptually, the Waldfogel regression . . . may provide a richer look than the Bortz survey into factors that impact the purchasing decision of cable operators."[2] But the Judges concluded that "there are limits to th[e] usefulness" of the Waldfogel regression in that proceeding, "largely stemming from the wide confidence intervals for the Waldfogel coefficients." *Id.*

Dr. Crawford's analysis in this proceeding clearly satisfied the criteria described in those decisions for a Waldfogel-type regression to be used as a starting point for calculating awards. Because he had more and better data, which enabled him to construct a superior regression, Dr. Crawford's analysis vastly improved upon the regression analyses discussed in prior proceedings. Unlike those regressions, Dr. Crawford's estimates were highly statistically significant with respect to all of the claimant groups' programming minutes even when using a fixed-effects specification.[3] Dr. Crawford's confidence intervals were much narrower than the

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[2] *Distribution of the 2004 and 2005 Cable Royalty Funds*, Distribution Order, 75 Fed. Reg. 57063, 57068 (Sept. 17, 2010) ("*2004–05 Distribution Order*").

[3] *Compare* Ex. 1045 at 21-22, app. E (1998–99 Rosston regression); Ex. 1046 at 2904:7-2905:3, 2945:18-21 (same), *and* Ex. 1051 at 11 (2004–05 Waldfogel regression); Ex. 1052 at 911:9-917:8 (same), *with* Ex. 2004 at B-1 (Crawford); Tr. 1399:12-1400:11 (Crawford). *See also* Ex. 1046 at 2942:8-12 (Rosston) (noting the superiority of fixed-effects specifications).

confidence intervals of the regressions in prior proceedings. *See* Determination at 37.[4] Prior decisions did not forbid the use of an *improved* Waldfogel-type regression as a starting point for calculating shares. Rather, they *endorsed* using such a regression to "directly measur[e] relative value." *1998–99 CARP Report* at 50.

Moreover, the fact that certain specific regressions in prior proceedings were determined to be less reliable than the specific surveys in those proceedings is not "precedent" that required the Judges to find that Dr. Crawford's different regression in this proceeding was less reliable than the new surveys in this proceeding. As the Determination explained, "The concept of 'precedent' typically relates to judicial deference to prior *legal* determinations, not *factual* ones." Determination at 11. Not only is Dr. Crawford's regression superior to past regressions, but there was substantial evidence that the surveys in this proceeding were worse than surveys in prior proceedings, and substantial new evidence of the problems with cable-operator surveys in general. *See, e.g.*, *id.* at 36–37, 69–80.

Program Suppliers also argue that because "tonnage and royalty fees" are *inputs* into Dr. Crawford's regression analysis, and neither of those inputs standing alone is "equal to value," it was "legal error" to rely on the *output* of Dr. Crawford's regression analysis. Motion at 5. But Dr. Crawford did not use only volume to estimate value, nor did he use only royalty fees to estimate value. Obviously, inputs that on their own are not measures of value (*e.g.*, price and quantity) may be used in combination to estimate value, when analyzed properly.

Far from committing "clear legal error," the Judges did not err at all in relying on Dr. Crawford's regression analysis as a starting point for determining shares.

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[4] *Compare, e.g.*, Ex. 1046 at 2869:8-2879:11 (Rosston), *and* Ex. 1052 at 917:2-8 (Waldfogel), *with* Ex. 2004 at 41 fig. 17 (Crawford).

B. Dr. Gray and Dr. Erdem's Mistakes or Lack of Effort in Attempting to Replicate Dr. Crawford's Analysis Are Not a Basis for Rehearing.

Dr. Gray and Dr. Erdem did not replicate Dr. Crawford's regression analysis because of their own mistakes or lack of effort, not because of any flaw in Dr. Crawford's analysis. Indeed, Dr. George successfully replicated Dr. Crawford's initial analysis, which is the analysis that the Determination used as a starting point. *See* Ex. 4007 at 23–29; Tr. 2061–62.

Dr. Erdem admitted that the reason he did not replicate Dr. Crawford's analysis was because he "did not have time for sufficient testing." Ex. 5007 at 14. Given that admission, it is unsurprising that Program Suppliers omitted any mention of Dr. Erdem's failure to replicate Dr. Crawford's analysis in their proposed findings, which thereby waived Program Suppliers' right to object on that ground. *See* 37 C.F.R. § 351.14(b); *cf. Leidos*, 881 F.3d at 217.

The only evidence that Program Suppliers cite for Dr. Gray's failure to replicate Dr. Crawford's analysis is an unprompted, unexplained oral statement that Dr. Gray made in passing. *See* Tr. 3739. But Dr. Gray never suggested that his failure to replicate precisely Dr. Crawford's analysis was any indication of error by Dr. Crawford. *See id.* To the contrary, Dr. Gray minimized the issue and argued that his attempted replication was "close" to Dr. Crawford's analysis, allowing Dr. Gray to put forward a "modification" of Dr. Crawford's analysis that he viewed as superior. *Id.*; *see* Ex. 6037 at 9 (Gray) (presenting an "attempted replication" and a "modification" of Dr. Crawford's analysis, without any suggestion that the differences between Dr. Gray's attempted replication and Dr. Crawford's analysis were the fault of anyone other than Dr. Gray himself).[5] There is no evidence that Dr. Gray's purported inability to replicate exactly

[5] As Dr. Crawford explained, Dr. Gray's purportedly similar analysis was in fact entirely different and "not at all a replication" because Dr. Gray "aggregate[d] th[e] subscriber group level information up to the level of the systems, which means right away that he cannot do fixed effects anymore, so he doesn't do fixed effects, and he then adds additional variables." Tr. 1422.

Dr. Crawford's analysis reflects any unreliability in Dr. Crawford's analysis.

C. Whether the Judges Adequately Explained the Ranges of Reasonable Royalty Awards Is Irrelevant.

Contrary to Program Suppliers' suggestion, the Determination explained exactly how the Judges determined each party's shares (with the exception of the upward adjustments for SDC and CCG, discussed below). The Judges "use[d] Professor Crawford's point estimates as the starting point," made upward adjustments for both the SDC and CCG categories, and then "adjust[ed] the Crawford-based allocations for the remaining categories to account for the increased allocations to the SDC and CCG categories, and to ensure that the percentages total 100% after rounding." Determination at 118. The Judges explained in detail why they found Dr. Crawford's regression "more persuasive" than the surveys or other studies. *Id.* at 79. Given these explanations of the actual share calculations, the "ranges of reasonable allocations" are *dicta* that did not affect the determination of the awarded shares.

D. The Judges Did Not Adequately Explain Their Upward Adjustments for the Settling Devotional Claimants and Canadian Claimants Group.

Public Television does not oppose reconsideration regarding the Determination's upward adjustments for SDC and CCG. With respect to the former, the Determination stated only that the upward adjustment for SDC was based on unidentified "testimony concerning the 'niche' value of devotional programming." Determination at 118. But the relative value of all distantly-retransmitted programming, including "niche" programming, was already accounted for in Dr. Crawford's analysis. Moreover, Public Television presented undisputed evidence that Public Television had the most valuable programming in six important niches in 2010–2013—children's programming; historical drama; history; science, medicine, and technology; the arts; and news and public affairs—yet the Judges did not explain why an upward adjustment was appropriate for SDC but not Public Television. *See* Public Television Proposed Findings of Fact

and Conclusions of Law at 84–87 (Apr. 5, 2018). Even if devotional programming were the only "niche" programming entitled to additional value that was not accounted for in Dr. Crawford's regression analysis (which is not the case), the Judges did not explain how they determined the magnitude of that additional value. Indeed, the Judges' awards to SDC exceeded the amounts that SDC themselves claimed would be reasonable. *See* Settling Devotional Claimants' Proposed Findings of Fact and Conclusions of Law at 63 (Apr. 5, 2018) ("SDC's average allocation should fall between 4.6% and 4.7%").[6]

With respect to CCG, the Determination stated that the upward adjustment was based on "Professor George's analysis and testimony that Professor Crawford's analysis . . . undervalues Canadian programming to a degree." Determination at 118. But the Judges' awards to CCG exceeded the amounts that Dr. George specifically testified would properly account for any undervaluing of Canadian programming in Dr. Crawford's analysis. *See* Ex. 4007 at 28–29 (George) (adjusting Dr. Crawford's regression to account for the Canada zone and calculating shares of 4.6% in 2010, 4.58% in 2011, 4.69% in 2012, and 5.10% in 2013, "an increase of 11 percent" from Dr. Crawford's analysis). No explanation was given for those differences.

Although the Judges are permitted to reconsider the limited issue of these two adjustments, the record should not be reopened, and no further testimony or evidence should be accepted or considered, because there is no "new evidence" that could not have been timely presented with respect to this issue. *2004–05 Denial of Rehearing* at 1.

[6] Moreover, SDC accounted for only 2.3% of compensable minutes (Ex. 2004 at 25 fig. 12), yet the Determination awarded SDC an average share of over 5%, implying that each minute of SDC programming was *more than twice* as valuable on average as each minute of Program Suppliers, Public Television, Commercial Television, and Canadian programming—despite overwhelming evidence that each minute of SDC programming was *less* valuable on average than each minute of any other category of programming. *See, e.g.*, Ex. 2004 at 43 ¶ 151 (Crawford).

E. Whether the Judges Incorrectly Reallocated the "Other Sports" Category Is Irrelevant to the Judges' Final Awards.

The Judges determined that the "Other Sports" category was misleading and should not have been included in the Horowitz survey because "there may have been little to no 'other sports' content." Determination at 78–79 ("Horowitz's inclusion of Other Sports created a value where none, or next to none, existed"). Given the conclusion that the category should not have been included at all, the Judges rightly did not "reallocate" that category only to claimants who claimed supposed "other sports" programming. In any event, this issue is irrelevant because the Determination did not use the Horowitz survey in setting actual awards. *See id.* at 118–19.

F. Whether the Judges Improperly Excluded Program Suppliers' Corrected Nielsen Data Is Irrelevant to the Judges' Final Awards.

It is irrelevant whether the Judges improperly excluded Dr. Gray's errata because the Judges concluded that they would not have relied on that testimony in any event. *See* Determination at 96–98; *id.* at 98 ("Dr. Gray's viewing study . . . fail[s] to provide a complete measurement of value").

G. The Judges Determined That Changed Circumstances Evidence Is Reflected in the Judges' Final Awards.

The Judges are not required to separately address every piece of evidence, such as John Mansell's testimony regarding sports' migration to cable networks over the past 30 years. Dr. Crawford's regression analysis already accounted for changed circumstances, including sports migration. *See, e.g.*, Tr. 2476 (McLaughlin) ("[I]f you look at changed circumstances, that begins with the past and moves to the present and tells you what the present would be based on that change. And if you just look at the present, that's going to incorporate the change in it.").

IV. Conclusion

The Motion should be denied, except with respect to the adjustments for SDC and CCG.

November 19, 2018

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Monday, November 19, 2018 I provided a true and correct copy of the Public Television Claimants' Response to Program Suppliers' Request for Rehearing to the following:

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Signed: /s/ Ronald G. Dove Jr.